

Law Office of Nora J. Chorover

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OFFICE OF THE REGIONAL ADMINISTRATOR

December 8, 2015

BY CERTIFIED MAIL

Jonathan Olson, President
P.J. Keating Company
998 Reservoir Road
Lunenburg, MA 01462
Certified Mail #: 7014 3490 0000 7429 8459

Corporation Service Co., Registered Agent
P.J. Keating Company
84 State Street
Boston, MA 02109
Certified Mail #: 7014 3490 0000 7429 8466

Re: 60-Day Notice of Violations and Intent to File Suit Regarding Noncompliance
with Federal Clean Water Act's Industrial Stormwater Discharge Requirements:
998 Reservoir Road, Lunenburg, Massachusetts

Dear Sirs and Madams,

This office represents Clean Water Action, a national non-profit citizens' organization working for prevention of pollution in the nation's waters. Clean Water Action has over one million members nationally, more than 50,000 of whom reside in Massachusetts.

We write to give notice that Clean Water Action intends to file a civil action in the United States District Court for the District of Massachusetts under section 505 of the Federal Clean Water Act (the "Act") against P.J. Keating Company ("P.J. Keating"). The subject of the action will be P.J. Keating's failure to properly monitor and control its polluted stormwater discharges to waters of the United States from its mineral mining and dressing and asphalt manufacturing facility in Lunenburg, Massachusetts (the "Facility"). By failing to adequately monitor and control its polluted stormwater discharges, P.J. Keating is violating the terms of EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity.¹

¹ The General Permit was first issued in 1995 and most recently reissued in June 2015 in substantially similar form. See 60 Fed. Reg. 50804 (Sept. 29, 1995); 65 Fed. Reg. 64746 (Oct. 30, 2000); 73 Fed. Reg. 56572 (Sept. 29, 2008), and reissued in 2015 pursuant to 80 Fed. Reg. 34403 (June 4, 2015).

BACKGROUND

Activities that take place at industrial facilities, such as material handling and storage, are often exposed to the weather. As runoff from rain or snowmelt comes into contact with these materials, it picks up pollutants and transports them to nearby rivers, lakes, or coastal waters and tributaries thereto, including but not limited to storm sewer systems, wetlands, and other surface waters. Stormwater pollution is a significant source of water quality problems for the nation's waters.

Clean Water Action will ask the Court to ensure P.J. Keating's future compliance with the Act, assess civil penalties in an appropriate amount,² award plaintiff its litigation costs, including attorney and expert fees, and award any other relief the Court deems appropriate. Clean Water Action's complaint will be filed a minimum of 60 days after the postmark date of this letter. This is a formal 60-day notice of intent to sue that is being served pursuant to 40 C.F.R., Part 135.

This notice is being provided by:

Cindy Luppi, New England Regional Co-Director
Clean Water Action
88 Broad Street, Lower Level
Boston, MA 02110
(617) 338-8131
(617) 335-6449 (fax)

Counsel for Clean Water Action in this case is:

Nora J. Chorover
Law Office of Nora J. Chorover
11 Green Street
Boston, MA 02130
617-477-3550

² The Statute authorizes the Court to assess a penalty of up to \$37,500 a day for each violation. See 33 U.S.C. § 1319(d) and 78 Fed. Reg. 66647 (Nov. 6, 2013).

P.J. KEATING'S VIOLATIONS AND DATES OF VIOLATIONS

A. THE REQUIREMENTS OF THE ACT

1. Pollutant Discharges without a Permit are Illegal.

The Clean Water Act makes the discharge of pollution into waters of the United States unlawful unless the discharge is in compliance with certain statutory requirements, including the requirement that the discharge be permitted by the federal Environmental Protection Agency ("EPA") under the National Discharge Elimination System ("NPDES").

2. Mineral Mining and Dressing and Asphalt Manufacturing Facilities and Must Comply with EPA's General Industrial Stormwater Permit.

In order to minimize polluted stormwater discharges from certain categories of industrial facilities, EPA has issued a general industrial stormwater permit (the "Permit"). Mineral mining and dressing facilities are subject to the requirements of this Permit.³ Mineral mining and dressing facilities which carry on other types of activities also subject to the requirements of the Permit must also comply with any sector-specific requirements for such co-located industrial activity.⁴

3. Mineral Mining and Dressing and Asphalt Manufacturing Facilities Must Develop and Implement a Stormwater Pollution Prevention Plan ("SWPPP").

An owner or operator (hereafter referred to as "operator") of a facility subject to the requirements of the Permit must prepare a SWPPP before being authorized to discharge under the Permit.⁵ The SWPPP must be "prepared in accordance with good engineering practices"⁶ and, among other things,

- identify potential sources of pollution at the facility;⁷
- describe and ensure implementation of control measures that are technologically available and economically practicable and achievable in light of best industry practice;⁸ and
- set forth specific procedures to assure compliance with effluent limitations and monitoring/inspection requirements of the Permit.⁹

³ Permit, Appendix D, pg. D-3.

⁴ Permit, pg. 101.

⁵ Permit, Section 5 and Section 8.J.6.

⁶ Permit, pg. 30 (referring to "control measures").

⁷ Permit, pgs. 32-33.

⁸ Permit, pgs. 14, 33-34.

4. Mineral Mining and Dressing and Asphalt Manufacturing Facilities Must Comply with the Terms of the Permit.

The Permit requires mineral mining and dressing facilities to, among other things:

- a. ensure that stormwater discharges meet applicable water quality standards;¹⁰
- b. reduce and/or eliminate pollutants to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice;¹¹
- c. implement specific best management practices set forth in the Permit for mineral mining and dressing facilities;¹²
- d. monitor stormwater discharges for compliance with benchmark limitations and effluent limitations applicable to sand and gravel facilities;¹³
- e. perform regular facility and stormwater inspections;¹⁴
- f. report on monitoring and inspections to EPA by specified deadlines;¹⁵ and
- g. comply with those permit conditions applicable to permittees in Massachusetts, including but not limited to
 - i. submission of monitoring results to the Regional Office of the Massachusetts Department of Environmental Protection (“MADEP”) for the MADEP Region in which the Facility is located, where the monitoring identifies exceedences of any effluent limits or benchmarks for which monitoring is required under the Permit. and
 - ii. where effluent limits and/or benchmarks are exceeded, submission to the MADEP Regional Office of any follow-up monitoring and a description of the corrective actions required and undertaken to meet those effluent limits and/or benchmarks.¹⁶

⁹ Permit, pgs. 34-36.

¹⁰ Permit, pg. 20 (“Your discharge must be controlled as necessary to meet applicable water quality standards.”).

¹¹ Permit, pg. 14.

¹² Permit, pg. 101-113.

¹³ Permit, pg. 113-114. P.J. Keating was required to monitor for Total Suspended Solids (“TSS”) and Nitrate plus Nitrite Nitrogen for compliance with benchmark limits. Any mine dewatering discharges were subject to effluent limitations for levels of pH. If the company performs sand mining, its mine dewatering discharges must comply with pH effluent limits.

¹⁴ Permit, pgs. 22-26.

¹⁵ Permit, pgs. 47-51.

¹⁶ Permit, pg. 170.

B. P.J. KEATING'S VIOLATIONS AND DATES OF VIOLATIONS

The following violations of the Act are set forth on Exhibit A. These violations have occurred on a daily basis for the last five years and they are continuing to occur.¹⁷

- a. failure to prepare and implement an adequate SWPPP;
- b. failure to ensure that stormwater discharges from the Facility will not cause or have the reasonable potential to cause or contribute to a violation of water quality standards;
- c. failure to implement adequate control measures;
- d. failure to adequately monitor for compliance with benchmark limitations; and
- e. failure to report appropriate monitoring results for the Facility to EPA by the specific deadlines.

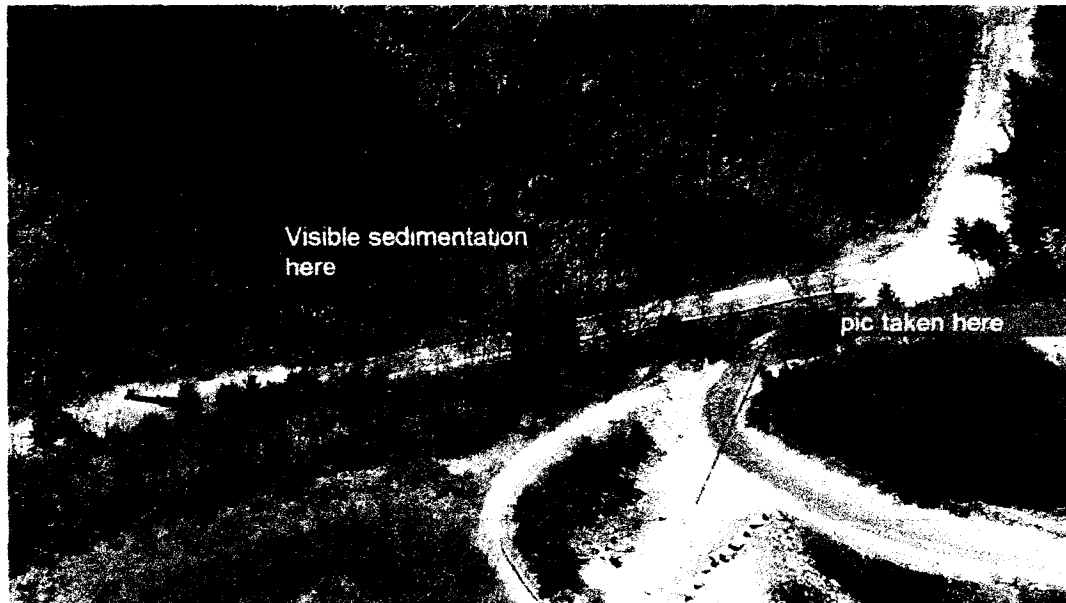
Whatever measures P.J. Keating may have put in place to monitor and control stormwater pollution are not sufficient to comply with the permit as is evident from the excessive amount of pollutants being discharged to adjacent wetlands and waterbodies. Instances of this excessive pollutant loading is observable at the Facility at numerous locations, including on the public roadway. For example, on September 30, 2015, Clean Water Action observed pollutant laden stormwater discharging from the quarry access road on the west of Fort Pond Road into a stream that discharged through a culvert under Fort Pond Road and thence into a pond to the north. Visible sediment was present all along the course of the discharge, and a sediment plume was visible in the impacted pond. The following annotated photographs depict this example location of sediment transport:

¹⁷ Clean Water Action believes that the violations set forth in this Section B have occurred on each day of the last five years, and not just on rain days. However, to the extent it is determined that rain days are relevant in determining the dates of violations, such rain dates through November 30, 2015 are set forth on Exhibit A hereto. The complaint, when filed, will set forth additional rain dates since November 30, 2015.



location of
observations



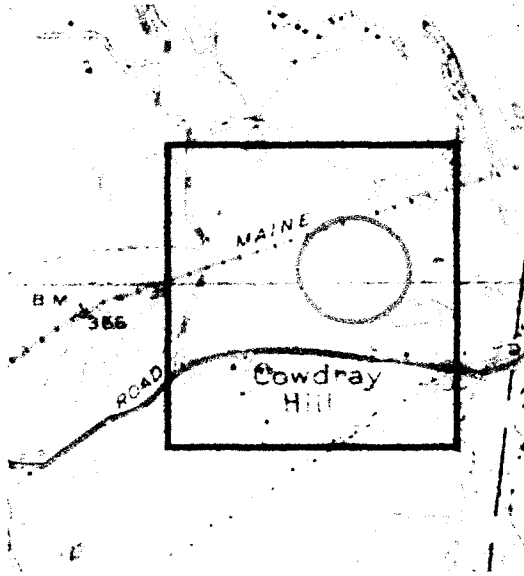


Examples of excessive sediment loading are also observable by comparing publicly available aerial photography, such as Google maps satellite imagery, Google Earth imagery, historic topographic maps, and the Commonwealth's wetlands map imagery. As shown below, stormwater at the facility is directed to or flows to an area designated as wetlands by the Commonwealth and depicted as wetlands on historic topographic maps. These areas are impaired by sediment, as is clear from the aerial photographs.

SOURCE: Massachusetts Department of Environmental Protection, Wetland and Wetland Change Area Map. <http://maps.massgis.state.ma.us/images/dep/omv/wetviewer.htm>. DEP polygons in green and blue showing wetlands and waterways. DEP yellow and orange hatched areas show historic wetlands change. Red circle added by Clean Water Action to show example area of concern:



Source: 1939 Shirley Quadrangle Topo Map 1939. Black rectangle added by CWA to show approximate area of above photograph. Red circle added by CWA to show example area of concern:



Source: Google Earth imagery – Imagery Date: 5/6/15. Depicting circled example area of concern:



P.J. Keating Company
December 8, 2015
Page 10

CONCLUSION

Clean Water Action believes this Notice of Violations and Intent to File Suit sufficiently states the basis for a civil action. During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of litigation. If you wish to pursue such discussions, please have your attorney contact us within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Sincerely,

A handwritten signature in dark ink, appearing to read "Nora J. Chorover", followed by a horizontal line.

Nora J. Chorover
Attorney for
CLEAN WATER ACTION

cc: (by certified mail)

Curt Spalding, Regional Administrator
EPA New England, Region 1,
5 Post Office Square, Ste. 100
Boston MA 02109
Certified Mail # 7014 3490 0000 7429 8435

Gina McCarthy, Administrator
US EPA Headquarters, Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
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Martin Suuberg, Commissioner
Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108
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EXHIBIT A
TABLE OF P.J. KEATING'S VIOLATIONS
December 8, 2010 to the present

<u>Type of Violation</u>	<u>Quarter</u>	<u>Parameter</u>	<u>Beginning Date of Violation</u>	<u>Earliest End Date of Violation</u>
Failure to Prepare and Implement an Adequate SWPPP	n/a	n/a	December 8, 2010	Present
Failure to Ensure that Discharges Will Not Violate Water Quality Standards	n/a	n/a	December 8, 2010	Present
Failure to Implement Adequate Control Measures	All	All	December 8, 2010	Present
Failure to Adequately Monitor for Compliance with Benchmark Limitations	All	All	December 31, 2010	Present
Failure to Report Appropriate Monitoring Results for the Facility to EPA by the Specific Deadlines	All	All	January 31, 2011	Present

EXHIBIT B

DAYS BETWEEN DECEMBER 8, 2010 AND NOVEMBER 30, 2015 ON WHICH STORMWATER FROM FACILITY DISCHARGED TO WATERS OF THE UNITED STATES

December 2010:	12, 26
January 2011:	12, 18, 21, 27
February 2011:	1, 2, 5, 8, 25, 27, 28
March 2011:	6, 7, 10, 11, 16, 21, 31
April 2011:	1, 4, 13, 16, 17, 19, 23, 27, 28
May 2011:	4, 15, 16, 1, 18, 19, 23
June 2011:	9, 11, 12, 13, 17, 22, 23, 24, 25, 29
July 2011:	8, 23, 25, 29
August 2011:	7, 8, 9, 15, 21, 25, 27, 28
September 2011:	6, 7, 8, 22, 23, 24, 28, 39
October 2011:	1, 4, 13, 14, 19, 20, 27
November 2011:	10, 16, 22, 23, 30
December 2011:	7, 21, 23, 27, 28
January 2012:	12, 21, 23, 26, 2
February 2012:	24, 28
March 2012:	1, 3
April 2012:	22, 23
May 2012:	1, 3, 8, 10, 14, 15, 22, 29
June 2012:	2, 4, 6, 7, 12, 13, 25
July 2012:	4, 23, 24, 28
August 2012:	1, 4, 5, 10, 11, 12, 15, 16, 17, 28
September 2012:	5, 8, 18, 21, 28
October 2012:	2, 7, 10, 14, 15, 19, 29, 30
November 2012:	8, 13
December 2012:	8, 9, 16, 17, 18, 21, 26, 27, 29
January 2013:	16, 28, 31
February 2013:	8, 9, 11, 19, 24, 27
March 2013:	6, 7, 8, 12, 19, 31
April 2013:	1, 10, 12, 20
May 2013:	8, 9, 11, 21, 22, 23, 24, 25, 29
June 2013:	3, 7, 8, 10, 11, 13, 14, 17, 18, 26, 28
July 2013:	1, 10, 23, 26
August 2013:	1, 2, 9
September 2013:	2, 12, 22
October 2013:	4, 6, 7, 31
November 2013:	1, 18, 22, 26, 27
December 2013:	6, 9, 14, 15, 17, 23, 29

January 2014:	2, 6, 11, 14, 18
February 2014:	3, 5, 13, 14, 15, 18, 19, 20, 21
March 2014:	12, 19, 20, 29, 30, 31
April 2014:	4, 8, 11, 15, 16, 23, 26, 30
May 2014:	1, 16, 17, 22, 24, 2, 28
June 2014:	4, 5, 13, 18, 26
July 2014:	2, 3, 4, 7, 9, 15, 23, 27, 28
August 2014:	13, 21, 31
September 2014:	6, 13, 21
October 2014:	1, 2, 4, 11, 16, 22, 23
November 2014:	1, 6, 17, 24, 26
December 2014:	3, 5, 6, 9, 17, 23, 24, 25
January 2015:	3, 4, 18, 24, 27
February 2015:	2, 5, 8, 9, 14, 15, 21
March 2015:	3, 14, 17, 26, 27
April 2015:	4, 8, 10, 20, 21
May 2015:	12, 28, 31
June 2015:	1, 2, 9, 15, 21, 23, 27, 28
July 2015:	1, 9, 10, 18, 22, 30
August 2015:	4, 11, 15
September 2015:	9, 10, 13, 30
October 2015:	9, 28, 29
November 2015:	11, 12, 19, 20, 28